No. 15101

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HAZEL ANNA WOLF,

Appellant,

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization Service,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

CHARLES P. MORIARTY
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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

JURISDICTIONAL STATEMENT

Jurisdiction of the District Court is conferred by the provisions of Section 2241, Title 28, United States Code, and on this Court by Section 2253, Title 28, United States Code.

STATUTES INVOLVED

The statutes involved are the Immigration and Nationality Act of 1952, Section 244, 66 Stat. 214, 8 U.S.C. 1254, and Title 8, C.F.R., Sections 6.1(d), 6.2, 244.2, 242.54(d), and 242.61.

STATEMENT OF THE CASE

The appellant herein challenges the validity of an order of the Board of Immigration Appeals denying her motion to reopen the deportation hearing, upon the alleged ground that said order denied appellant an opportunity to file an application for suspension of deportation under the provisions of Section 244 of the Immigration and Nationality Act of 1952 (R. 1, pp. 5, 6).[1] The facts of the case are accurately stated in the Memorandum Decision of the District Court (R. 10), and are restated here for convenience.

The appellant was found deportable by a Hearing Officer of the Immigration and Naturalization Serv-

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[1] The original papers filed in the District Court action constitute the record on appeal herein. The citation, R. 1, refers to the first document as listed by the Certificate of Clerk of U. S. District Court to Record on Appeal. This method of citation will be followed throughout the brief, and corresponds to the method utilized in appellant's brief. Page references refer to the page of the cited document.

ice on April 10, 1951, on the charges contained in the warrant for her arrest; namely, that she was a member of an organization which advocated the overthrow of the government of the United States and circulated written and printed matter so advocating under the Act of October 16, 1918, as amended, and that after entry she was an alien who was a member of the Communist Party of the United States (R. 10, p. 2). The decision of the Hearing Officer was adopted by the Commissioner on January 2, 1952, and after appeal to the Board of Immigration Appeals, the Board dismissed the appellant's (petitioner therein) appeal on November 5, 1952. An action for judicial review was instituted in the court below on November 25, 1952, and said action was dismissed on February 4, 1953. An appeal was taken to the Court of Appeals for the Ninth Circuit and the decision of the District Court was affirmed. *Wolf* v. *Boyd*, 215 F. 2d 377 (C.A. 9, 1954). On February 28, 1955, the United States Supreme Court denied certiorari (348 U.S. 951, 99 L.Ed. 743, 75 S.Ct. 438). Thereafter a private bill, S. 1425, was introduced on the appellant's behalf by Senator Langer and on October 21, 1955, a stay of deportation was granted until February 1, 1956, by the Commissioner of Immigration and Naturalization. Favorable action on the bill was not taken by Congress. A subsequent stay of deportation was granted by the Commis-

sioner until February 10, 1956, upon appellant's filing of a motion to reopen the deportation proceedings. Appellant's motion to reopen the deportation proceedings was filed on January 27, 1956, and was addressed to the Board of Immigration Appeals.

On February 8, 1956, the Board of Immigration Appeals denied appellant's motion to reopen the deportation proceedings and on February 9, 1956, appellant filed a "Petition for Writ of Habeas Corpus, and Order To Show Cause; for Declaratory Judgment and Injunctive Relief," after having been ordered to report for deportation on February 10, 1956. The petititon alleged that the order of the Board of Immigration Appeals dated February 8, 1956, denied the petitioner therein the right to apply for suspension of deportation under Section 244 of the Immigration and Nationality Act of 1952. The lower court denied the application for writ of habeas corpus and discharged the rule to show cause theretofore issued. This appeal followed.

QUESTIONS PRESENTED

1. Is appellant, who is an alien ordered deported prior to the effective date of the Immigration and Nationality Act of 1952, entitled as a matter of right to an administrative hearing on an application for sus-

pension of deportation under the provisions of the 1952 Act and Regulations pursuant thereto?

2. Did the denial of appellant's motion of January 27, 1956, to reopen the deportation hearing constitute an exercise of discretion of the Attorney General or his authorized delegate, under the provisions of the Immigration and Nationality Act of 1952?

SUMMARY OF ARGUMENT

The validity of the deportation order is not in issue in this appeal. That issue has been passed upon by the District Court and this Court of Appeals, with certiorari denied by the United States Supreme Court; the appellant has conceded that the matter is not an issue herein.

There is no applicable procedure specified in the Immigration and Nationality Act of 1952 or the regulations thereunder which govern the manner in which an application may be made for suspension of deportation under the provisions of the Act in cases such as the instant case, wherein the deportation proceedings were concluded prior to the effective date of the Act. In such cases the requirements of due process do not necessitate a formal hearing upon an application for suspension of deportation.

The appellant applied for discretionary relief under the provisions of the Immigration and Nationality Act of 1952 by filing her motion to reopen the deportation proceedings, and the Board of Immigration Appeals in denying said application expressly exercised the discretionary authority of the Attorney General to do so under the Act. In doing so, the Board gave overall consideration to the merits of the issue of suspension of deportation on the basis of the facts disclosed by appellant's motion to reopen and the record of her deportation hearing, and exercised its discretion against remission.

As the manner of exercising such discretion has not been challenged, the issue before the District Court related solely to whether the discretionary authority of the Attorney General to suspend deportation had been exercised. The court below correctly concluded that the discretion of the Attorney General had been exercised, and properly dismissed the petition for writ of habeas corpus.

ARGUMENT

I.

Is appellant, who is an alien ordered deported prior to the effective date of the Immigration and Nationality Act of 1952, entitled as a matter of right to an administrative hearing on an application for suspension of deportation under the provisions of the 1952 Act and Regulations pursuant thereto?

Appellant herein was ordered deported on January 2, 1952. The validity of the deportation proceedings is not an issue in this appeal. Subsequently, on January 27, 1956, appellant filed a motion to reopen the deportation proceedings, which motion was addressed to the Board of Immigration Appeals.

Appellant argues that Section 244 of the Immigration and Nationality Act of 1952 (66 Stat. 214, 8 U.S.C. 1254) provides that the Attorney General may, in certain enumerated instances, act to suspend deportation, and that inasmuch as administrative regulations formulated pursuant to the Act provide for hearings on applications for suspension of deportation, appellant in this case is entitled to such a hearing on the issue of her application for suspension of deportation.

As a review of the pertinent provisions of the Act and the regulations will demonstrate, the argument is

invalid because there is no applicable procedure specified in the 1952 Act or preceding acts which require a hearing upon an application for suspension of deportation in cases where, as here, the deportation hearing was concluded prior to the effective date of the 1952 Act. In such cases the requirements of due process do not require a formal hearing.

Section 244 (a) (5) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1254 (a) (5), under the provisions of which appellant seeks suspension of deportation, provides as follows:

> "As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who—
>
> * * * * *
>
> "(5) is deportable under paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17) or (18) of section 241 (a) for an act committed or status acquired subsequent to such entry into the United States or having last entered the United States within two years prior to, or at any time after the date of enactment of this Act, is deportable under paragraph (2) of section 241 (a) as a person who has remained longer in the United States than the period for which he was admitted; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such

> period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this Act in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence."

While aliens occupying the status of appellant were not eligible for suspension of deportation with the discretion of the Attorney General under the preceding Act, aliens deportable for other reasons were, and the regulations governing applications for discretionary relief had been in effect governing such procedure. Cases involving the preceding statutes and regulations will hereinafter be considered as they relate to the instant case.

Following the enactment of the Immigration and Nationality Act of 1952 the regulations applicable to procedures under the new law were revised and renumbered with each part of subchapter B of Chapter I of Immigration and Naturalization Regulations, 8 C.F.R., given the same number as the section of the Immigration and Nationality Act to which it relates. Section 244.2 relates to suspension of deportation and provides:

"An application for suspension of deportation shall be submitted in accordance with, and subject to, the provisions of § 242.54 (d) of this chapter and shall be determined and disposed of in accordance with the provisions of this part and § 242.61 of this chapter."

Section 242.54 (d) above referred to provides:

"*Application for discretionary relief.* Except in the case of an alien who is prima facie deportable under Section 242 (f) of the Immigration and Nationality Act, *at any time during the hearing the respondent may apply for suspension of deportation* on Form I - 256A or for voluntary departure, under section 244 of the said Act. The burden of establishing that he meets the statutory requirements for discretionary relief shall be upon the respondent. He may submit any evidence in support of his application which he believes should be considered by the special inquiry officer." (Emphasis supplied.)

Section 242.61, not set forth herein but also referred to above in quoted section 244.2, relates in detail to the procedure to be followed by the special inquiry officer in reaching and giving notice of a decision, as well as to appeals therefrom.

All the regulations relating to applications for suspension of deportation provide that such applications are to be made *during the course of administrative hearing* before the special inquiry officer, and there is no provision for application to be made at any other time. See *Perez-Perez* v. *Westmoreland*, 122 F.

Supp. 385 (D.C. S.D. Cal., 1954). Thus it is apparent that the statute and regulations promulgated thereunder do not provide for a hearing on the issue of discretionary relief or suspension of deportation in cases wherein the order of deportation has been entered prior to the 1952 Act, since in those cases the hearings have been concluded prior to the time when regulations were adopted to authorize the filing of applications for suspension of deportation *during* the hearings.

It is fundamental that the requirements of due process do not necessitate a hearing upon every administrative action, and where, as here, the statute and regulations thereunder do not provide for such hearings, the administrative proceedings are not therefore rendered invalid.

United States ex rel. Knauff v. *Shaughnessy*, 338 U.S. 537, 94 L.Ed. 317, 70 S.Ct. 309 (1950);

Federal Communications Commission v. *WJR, The Goodwill Station*, 337 U.S. 265, 93, L.Ed. 1353, 69 S.Ct. 1097 (1949);

Bi-Metallic Investment Co. v. *State Board of Equalization of Colorado*, 239 U.S. 441, 60 L.Ed. 372, 36 S.Ct. 141 (1915).

In a decidedly analogous case the Courts of Appeals for the Second Circuit held that a hearing upon the issue of suspension of deportation is unnecessary to satisfy the requirements of due process. See *United*

States ex rel. Adel v. *Shaughnessy*, 183 F. 2d 371 (C.A. 2, 1950). In that case the alien had been ordered deported in 1947. She obtained several stays, and accordingly, had not been deported when, on July 1, 1948, Congress amended the applicable statute so that, for the first time, she became eligible to apply for suspension of deportation. She applied to the Board of Immigration Appeals to reopen and reconsider her case and to pass upon her application for suspension of deportation. The Board denied her request, and she thereupon petitioned for a writ of habeas corpus in the federal district court. In its decision on the appeal from an order dismissing the writ, the Court stated:

> "Relator argues that she was entitled, after the statute's amendment, to a new hearing in which she might present evidence to show that she had never been connected with the business of prostitution. Assuming, *arguendo*, that ordinarily such a person would have been entitled to such a hearing, relator had no such right because the Board could properly rely on the findings of the Inspector made in 1946. Those findings were supported by sufficient evidence. Consequently, the Board could properly base its discretionary determination on those findings. The courts cannot review the exercise of such discretion; they can interfere only when there has been a clear abuse of discretion or a clear failure to exercise discretion."

As in the instant case, the alien sought a hearing to enable her to establish her eligibility under the latter statute for suspension of deportation, and as in

the instant case, the district court held such a hearing unnecessary, the Court of Appeals affirming the decision.

The Court of Appeals for the Third Circuit had occasion to rule on a case similarly in point in *Arakas* v. *Zimmerman*, 200 F. 2d 322 (C.A. 3, 1952). The pertinent facts and decision are set forth below:

> "On October 6, 1949, appellant was ordered to surrender for deportation. He petitioned the Commissioner for a stay so that he might become eligible for a suspension of deportation under the seven years' residence provision of a 1948 amendment to the Immigration Act, 8 U.S.C.A. Section 155(c), infra. The Commissioner denied the application. Arakas appealed to the Board and at the same time moved for reopening of the proceedings for consideration of suspension of deportation. The Board denied both the application for stay and motion to reopen by its order of October 26, 1949. He, having by that time established his seven years' residence, applied to the Board for a reopening of the proceedings. The motion was denied and the petition for habeas corpus followed. The motion to dismiss that petition was granted by the district court on September 26, 1951.
>
> "*The issue before us is whether, on the above facts, due process requires that appellant be granted a hearing on his application for suspension of deportation.* [Emphasis supplied.]
>
> * * * * *
>
> "Appellant contends that Subsection 150.6(g) of the Regulations gave him the right to a hearing on his motion and that at such hearing he was

entitled to introduce evidence on behalf of his application. This claim is completely without foundation. The particular subsection relied on relates to and outlines the procedure an alien may use *during his deportation hearing* in order to apply for suspension of deportation under 8 U.S.C.A. Section 155(c). It has no bearing on the present facts. The application at bar which asks that the *deportation hearing be reopened* illustrates this. At the time it was made the deportation hearings on Arakas had been long since concluded. There had been no motion of that type during those hearings, nor could there have been because the seven years' residence provision of Section 155(c) of the immigration law did not come into existence until 1948 and in 1944 Arakas had only been in the United States for one and a half years.

* * * * *

"Under the law the Board of Immigration Appeals, acting for the Attorney General, had the duty of exercising its discretion and deciding whether appellant's hearing should be reopened and the order for his deportation reconsidered. We find that it did this and that its decision not to reopen the hearing was properly based upon sufficient evidence. We have no right to disturb that determination.

"The judgment of the district court will be affirmed."

And so it is here. Appellant could not have applied for suspension of deportation during the course of the deportation hearing, as provided for in the regulations, because the provisions of the statute and regulations relied upon by appellant for the suspension of her deportation did not come into existence until

1952, and the hearing had been concluded prior to that time in 1951. Appellant was not accorded a hearing on the issue of suspension of deportation, since such a hearing was rendered unnecessary by the exercise of discretion of the Board of Immigration Appeals in deciding against suspension of deportation upon the merits of the case.

Althought the statute and regulations involved in the decisions referred to preceded the Immigration and Nationality Act of 1952, the cases are in point, as they relate to similar motions to reopen deportation hearings to permit applications for suspension of deportation. The motions to reopen in those cases, as well as in the present case, were filed at a time when legislation had been enacted authorizing the suspension of deportation for aliens occupying a status alleged to be held by the moving parties. Regulations adopted pursuant to the preceding statutes as well as the present Act provided that applications for suspension of deportation could be made *during* the deportation hearing, but they did not provide in either case a procedure whereby concluded deportation hearings could be reopened as a matter of right to permit applications for suspension of deportation. The courts in those cases affirmed the orders of the Board of Immigration Appeals, finding in effect that the issue

of suspension of deportation had been determined on the merits and that a hearing thereon was unnecessary.

The Supreme Court, in *Marcello* v. *Bonds*, 349 U.S. 302, 99 L.Ed. 1107, 75 S.Ct. 757, had before it an appeal challenging the validity of an order of deportation. In its opinion the Court noted that the Board of Immigration Appeals had considered the issue of suspension of deportation under Section 244(a) (5) of the Immigration and Nationality Act of 1952, the same statute under consideration in the subject case. The Court observed that the Board considered the issue although no formal application for suspension had been made, and had exercised its discretion against remission. Although the issue was not before it, the Court did recognize that the Board could and did consider suspension of deportation without a hearing on the issue.

> "Petitioner and counsel were advised of their right to apply to the Attorney General for the discretionary relief of suspension of deportation under § 244 (a) (5) of the Act. At first they declined to do so, but subsequently they moved to reopen the hearing to apply for such relief. The special inquiry officer denied the motion. On appeal, the Board of Immigration Appeals affirmed the order of deportation. Though no formal application for suspension of deportation under § 244 (a) (5) had been filed, the Board considered whether such relief was merited but exercised its discretion against the remission." *Marcello* v. *Bonds*, supra.

As in the instant case, no application for suspension could have been made *during* the deportation hearing, because that hearing was concluded prior to the time when relief was requested. Nevertheless, as the Supreme Court observed, the Board exercised its discretion against remission without a hearing or a formal application on the issue of suspension. Under these circumstances, the case necessarily lends support to appellee's position that in such cases the procedure followed under the prior Act is applicable to the subject case arising under the 1952 Act.

It is submitted that the foregoing authorities clearly establish the correctness of the lower court's ruling that a hearing on appellant's motion to reopen to permit an application for suspension of deportation was unnecessary. Neither the statute nor the regulations provide for such a hearing as a matter of right, and the Board of Immigration Appeals properly denied the motion to reopen after considering the issue of suspension of deportation on the merits. The lower court accurately interpreted the statute, regulations and controlling authorities, and correctly held a hearing on the application for suspension of deportation to be unnecsessary.

II.

Did the denial of appellant's motion of January 27, 1956, to reopen the deportation hearing constitute an exercise of discretion of the Attorney General or his authorized delegate, under the provisions of the Immigration and Nationality Act of 1952?

Appellant has argued that she was denied her right to a hearing upon the issue of her application for suspension of deportation, inasmuch as the Board of Immigration Appeals denied her motion to reopen the deportation hearing to permit her to make such an application. She further argues that because she was not permitted to make an application for suspension of deportation there has been no exercise of discretion on the part of the Attorney General or his delegate on that issue.

The first contention has been answered in Argument I herein, to the effect, summarized in simplest terms, that appellant was not entitled to such a hearing as a matter of right. The second contention is invalid because the conclusion reached therein does not necessarily follow . . . the issue of suspension of deportation could have been and was determined by the Board of Immigration Appeals without a hearing on the issue. Regardless of the fact that appellant was not accorded a hearing to enable her to make an appli-

cation for suspension of deportation, the issue of suspension of deportation in appellant's case was fully considered by the Board of Immigration Appeals and it exercised its discretion against remission.

The court below set forth the measure of what constitutes compliance with the requirements of due process, where, as here, the applicant has allegedly become eligible for suspension but no procedure has been provided whereby an application may be made:

> "There being no regulation specially directing the manner in which an application for discretionary relief shall be made by one situated as petitioner it would appear that she has been granted procedural due process if, after an overall evaluation of the procedures used, the facts disclosed and the decision reached, the statutory act of grace permitted the Attorney General actually has been made available to petitioner, accorded consideration and either denied or granted. *Application of Orlando*, 131 F. Supp. 485, affirmed 222 F. 2d 537." (Memorandum Decision, R. 10, p. 10.)

The rule as thus stated was applied prior to the 1952 Act, as was demonstrated in the first portion of our Argument. See *Arakas* v. *Zimmerman*, 200 F. 2d 322 (C.A. 3, 1952); *United States ex rel. Adel* v. *Shaughnessy*, 183 F. 2d 371 (C.A. 2, 1950); and *United States ex rel. Kaloudis* v. *Shaughnessy*, 180 F. 2d 489 (C.A. 2, 1950). Similar disposition of the issue was reached in a case involving Section 244 (a) (5)

of the Immigration and Nationality Act of 1952, the provision relied upon by appellant herein. See *Marcello* v. *Bonds*, 349 U.S. 302, 99 L.Ed. 1107, 75 S.Ct. 757.

In *Arakas* v. *Zimmerman*, *supra*, the Court of Appeals for the Third Circuit applied the rule in rejecting the contention that due process requires a hearing on a motion to reopen to permit the filing of an application for suspension of deportation, and concluded as follows:

> "Under the law the Board of Immigration Appeals, acting for the Attorney General, had the duty of exercising its discretion and deciding whether appellant's hearing should be reopened and the order for his deportation reconsidered. We find that it did this and that its decision not to reopen the hearing was properly based upon sufficient evidence. We have no right to disturb that determination."

The current Regulations of the Immigration and Naturalization Service, which supplement the Immigration and Nationality Act, similarly fix the responsibility of the Board of Immigration Appeals as to exercising the discretion of the Attorney General in deciding whether appellant's hearing should be reopened and the order for her deportation reconsidered. Motions to reopen or reconsider are within the jurisdiction of the Board of Immigration Appeals under

the provisions of 8 C.F.R., Part 6.2. Part 6.1 (d) of the Code of Federal Regulations provides:

> "*Powers of the Board*—(1) *Generally.* Subject to any specific limitation prescribed by this chapter, in considering and determining cases before it as provided in this part the Board shall exercise such discretion and authority conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case, except that the Board shall have no authority to consider or determine the manner, at whose expense, or to which country an alien shall be deported."

And accordingly, the Board of Immigration Appeals did exercise its discretion for the Attorney General in considering and denying suspension of deportation in the present case. An examination of the Board's order of February 8, 1956, denying the appellant's motion to reopen the hearing, discloses that the Board, in rendering its decision, fully considered the issue of suspension of deportation upon the entire record of the deportation hearing. The order, which was made a part of the respondent's return in the District Court (R. 4, Exhibit C) and is set forth in the court's memorandum decision (R. 10, pp. 4, 5 and 6), for convenience is set forth below:

> "This case is before us on counsel's motion for reopening which was filed on January 27, 1956.
>
> "On November 5, 1952, we dismissed the respondent's appeal from a decision of the Acting Assistant Commissioner, directing deportation on two

charges based on the Act of October 16, 1918 as amended by the Alien Registration Act of 1940, 8 U.S.C. 137. Thereafter, habeas corpus proceedings were instituted by the respondent which resulted in a decision adverse to her in the United States District Court. This judgment was affirmed by the United States Court of Appeals for the Ninth Circuit on August 10, 1954, and a rehearing was denied on October 11, 1954. *Wolf v. Boyd*, 215 F. 2d 377 (C.A. 9, 1954). On February 28, 1955 certiorari was denied, 348 U.S. 951.

"The present motion seeks to have the hearing reopened to permit the respondent to file an application for suspension of deportation under the provisions of Section 244(a)(5) of the Immigration and Nationality Act. We have previously held that an application for discretionary relief must be submitted during the Immigration hearing. *Matter of M—*, 5 I&N Dec. 472 (1953); *Matter of C—*, 5 I&N Dec. 630 (1954). In *Marcello v. Bonds*, 349 U.S. 302, 313 (1955) the court said that this Board was not bound to consider the question of suspending deportation on the merits where the alien had failed to make an application for that relief at the hearing before the special inquiry officer. Our decisions in *Matter of M—* and *Matter of C—*, supra, are not controlling because the respondent was not eligible for suspension of deportation under the legislation which was in effect when the hearing was closed on February 12, 1951. However, they do indicate the necessity for promptness in making such an application.

"The Immigration and Nationality Act became law on June 27, 1952 and was effective on December 24, 1952. Over three years have elapsed from the latter date and the motion to reopen contains no explanation for the delay in its sub-

mission. We note that the Supreme Court handed down its decision in the respondent's case on February 28, 1955 and that counsel's affidavit in support of the motion is dated March 16, 1955. A serious administrative problem would be created for the Service if we were to sanction a procedure by which counsel could remain inactive until deportation was imminent and then upset the proceeding with a motion to reopen for discretionary relief which apparently could have been submitted at any time after December 24, 1952.

"The respondent declined to testify at the hearing on the advice of counsel. The motion to reopen contains no information as to whether the respondent admits that she was a member of the Communist Party and if so, whether such membership has terminated and the date of termination. 8 C.F.R. 6.21 provides that motions to reopen shall be supported by affidavits or other evidentiary material. As applied to this respondent, who is attempting to secure the exercise of administrative discretion, we believe this regulation made it incumbent upon her to furnish her own affidavit concerning the period of her membership in the Communist Party, the extent of her activities while a member, the date when she terminated her membership, and detailed information as to the hardship which would result to her if she is deported.

"8 C.F.R. 6.21 also provides that in any case in which a deportation order is in effect, there shall be included in the motion to reopen a statement by or on behalf of the moving party declaring whether or not the alien is the subject of any criminal proceeding under Section 242(e) of the Immigration and Nationality Act and, where the motion is for the purpose of securing discretionary relief, there is to be included a statement as to whether or not the alien is subject to any

pending criminal prosecution. The motion fails to comply with these two requirements.

"It is well settled that a rehearing in an administrative proceeding is not a matter of right but lies within the discretion of the agency making the order. *United States et al v. Pierce Auto Freight Lines, Inc. et al,* 327 U.S. 515, 535 (1946); *Interstate Commerce Commission et al v. City of Jersey City et al,* 322 U.S. 503, 514 (1944). The facts asserted in the motion to reopen are not persuasive that this case merits the exercise of the discretionary authority to suspend deportation. After careful review of the record, it is our considered opinion that a reopening of the proceeding is not warranted and counsel's motion will, therefore, be denied.

"ORDER: It is ordered that counsel's motion be and the same is hereby denied.

"Thos. G. Finucane
Chairman"

The lower court in its memorandum decision with forceful reason and logic concluded with respect to the Board's order, supra:

"Considering in this case the procedure used, the facts disclosed and decision reached, it must be admitted that petitioner's right to ask for discretionary relief was recognized when the Board of Appeals accepted and acted as it did upon the motion to reopen. The Board in its decision reviewed briefly petitioner's record with respect to earlier administrative and judicial proceedings. It indicated its views as to the inadequacy of the showing made in connection with the motion to reopen. While these views were directed in such a manner as to appear related only to procedural defects they likewise show that the Board was

familiar with and had considered the merits of petitioner's case. The concluding two sentences of the final paragraph of the Board's decision reading as follows:

> 'The facts asserted in the motion to reopen are not persuasive that this case merits the exercise of the discretionary authority to suspend deportation. After careful review of the record, it is our considered opinion that a reopening of the proceeding is not warranted and counsel's motion will, therefore, be denied.'

indicate to the court that the Board after recognizing petitioner's right to apply for suspension of deportation and thus invoke the discretion of the Attorney General reviewed its own record of her case which obviously was before and available to it, considered the showing as made and exercised its discretion on behalf of the Attorney General on the merits of any application for suspension of deportation that might be made as proposed in the motion to reopen and did so unfavorably by denying the motion to reopen deportation proceedings.

"The Board's right to rely upon the findings of an earlier hearing on petitioner's deportability in exercising its discretion is supported by *Adel v. Shaughnessy*, supra; *Kavadias v. Cross*, 82 F. Supp. 716.

"The manner in which the discretion is exercised is not a controlling factor where the claim is as here that discretion has not been exercised. *Accardi v. Shaughnessy*, supra.

"In the case of *James v. Shaughnessy*, 202 F. 2d 519 where an application for suspension of deportation had been denied and the claim was that its denial was not the result of an actual exercise of discretion but of an unlawful refusal to exercise it, Judge Chase in speaking for the Court of

Appeals upon relator's appeal from a denial of a writ, affirmed the lower court, stating:

> 'The appellant does not now raise any question as to the deportation order itself. Admittedly he is deportable on the ground above stated; and if his application for the suspension of the order has been duly considered and decision reached on an overall evaluation of the circumstances shown, this appeal must fail.'
>
> "So here it is the court's conclusion that petitioner, concededly deportable under a valid order of deportation, has in effect received consideration of an application for suspension of deportation, the application being by way of a motion to reopen proceedings, and a decision was reached thereon by an overall evaluation of the facts and circumstances revealed by the motion to reopen as well as the record already before the Board as a result of earlier hearings. Under such circumstances the petition should be dismissed."

It is submitted that the record in this appeal clearly shows the District Court's thorough familiarity with the issues of fact and principles of law involved, and that the court correctly held appellant not to be entitled as a matter of right to a hearing upon the issue of suspension of deportation, and further, that the Board of Immigration Appeals did exercise its discretion for the Attorney General in denying appellant's motion to reopen the hearing.

III.

Appellant's Argument

The principal contentions set forth in appellant's opening brief have been answered in Arguments I and II herein. However, we shall briefly refer to that portion of appellant's argument which maintains, in effect, that the subject case is distinguishable from those cases relied upon by appellee which hold that the issue of suspension of deportation may be considered and determined without the necessity of a hearing upon that issue. Appellant attempts to distinguish the holdings in such cases from the subject case upon the contention that in the subject case appellant has established, in her motion to reopen the deportation hearing, a *prima facie* case as to her eligibility for suspension of deportation; whereas, it is asserted, in those cases holding a hearing unnecessary upon the issue of suspension of deportation, it appeared from the record that the petitioner was not entitled to suspension of deportation. Appellant further argues that such an interpretation is required by the regulations in that the Board of Immigration Appeals is not given the power to pass upon applications for suspension of deportation except in an appellate capacity following the making of a record before a special inquiry officer.

In attempting to thus distinguish those cases from the subject case, he points out that in *United States ex rel. James* v. *Shaughnessy*, 202 F. 2d 519 (C.A. 2, 1953), cited by the court below in its decision, and *Kavadias* v. *Cross*, 82 F. Supp. 716 (D.C. N.D. Indiana, 1948) (reversed on other grounds, 177 F. 2d 497 (C.A. 7, 1949)), and *United States ex rel. Adel* v. *Shaughnessy*, 183 F. 2d 371 (C.A. 2, 1950), relied upon by appellee, the petitioners therein made no *prima facie* showing that they were eligible for suspension of deportation. Appellant's argument, summarized, appears to be that in such cases the Board of Immigration Appeals can exercise its discretion and deny suspension of deportation on the record of the deportation hearing without a further hearing on the application to suspend deportation, but that in the subject case there must be a hearing on the application because appellant has made a *prima facie* showing of eligibility for suspension of deportation.

But the decisions cited do not permit the limited construction appellant would have the Court apply. The decisions not only hold that the petitioners therein were entitled to an exercise of the discretion of the Attorney General on the issue of suspension of deportation, but that such discretion had been exercised. What exercise of discretion was necessary if the petitioners had not made a *prima facie* showing of eligi-

bility for suspension? In such cases no exercise of discretion is necessary because the petitioner is precluded from suspension of deportation as a matter of law.

It is submitted that the decisions referred to did not turn on the question of whether the petitioners therein were *eligible* for suspension of deportation, but rather were decided upon the courts' rulings that, apart from the question of eligibility, the Board of Immigration Appeals could and did refuse to exercise its authority to suspend deportation. Reference to the decisions indicates such to be the holding of the courts:

> "We agree with this statement of the district judge: 'As I read the record, relator's applications were refused not because the Board had no power to grant the application, nor because it found that relator had not proved good moral character for five years previous, nor because she failed to prove seven years' residence in the United States * * * *In other words, the Board, while admitting that relator was qualified to ask for the relief, exercised its discretion and ruled against her.*'" (Emphasis supplied.) *United States ex rel. Adel* v. *Shaughnessy*, 183 F. 2d 371, 372 (C.A. 2, 1950).

In *United States ex rel. James* v. *Shaughnessy*, 202 F. 2d 519 (C.A. 2, 1953), a special inquiry officer found the respondent therein "eligible for the privilege of suspension of deportation," but nevertheless had recommended deportation. The Commissioner

of Immigration subsequently denied suspension of deportation, and respondent petitioned for a writ of habeas corpus. In its decision affirming the district court's order denying the writ, the Court stated:

> "On the contrary, it is abundantly clear that he has been given administrative consideration of his application on the basis of individual merit, or the lack of it, with recognition of his right to make the application. As the opinion of the Board of Appeals disclosed, its decision was an actual exercise of discretion in the light of 'respondent's own statements and other evidence of record'."

In *Kavadias* v. *Cross*, 82 F. Supp. 716 (reversed on other grounds 177 F. 2d 497 (C.A. 7, 1949)) the district court held that the action of the Board in denying the petitioner's application for suspension was not arbitrary in view of the fact that the petitioner therein had not proved good moral character during the five years preceding his application for suspension of deportation, a prerequisite to eligibility under the statute there under consideration. In relation to the application for suspension, the Court observed:

> "In considering these questions, emphasis must be placed upon the fact that a deportation hearing had been afforded the petitioner before he applied for a suspension under § 155(c). Of course, he was not in a position in 1941, when the hearing was conducted, to apply for such a suspension. And as a result of that hearing, a deportation order was issued and was unexecuted and outstanding against him for more than five

years before the petitioner created the situation which qualified him to make an application for a suspension of the order. *In other words, his deportation status had already been fixed in accordance with existing administrative procedure long before he became entitled to make an application for a suspension.* It would thus appear that the regulations governing the procedure to be followed by the Immigration Service Inspector in deportation proceedings, as regards suspensions under § 155 (c), could not and need not have been observed in this case. Indeed, the petitioner himself recognized this by the filing of his motion with the Board of Immigration Appeals to 'reopen and reconsider' his deportation order.

"But regardless of this, it would seem that the Board of Immigration Appeals would necessarily have to consider this motion and exercise the discretion allowed in suspension applications 'honestly and in good faith and not arbitrarily or capriciously.' United States ex rel. Weddeke v. Watkins, supra." (Emphasis supplied.)

Appellee submits that a fair analysis of the cited decisions, supra, necessitates the conclusion that due process does not require a hearing upon the issue of suspension of deportation, *regardless of the question of eligibility*, where, as here, there are no regulations directing the manner in which an application for suspension of deportation can be made or considered. Two additional cases relied upon by appellee in the court below (R. 8, pp. 2, 3), which are not discussed in appellant's brief, clearly demonstrate the validity of this interpretation *Arakas* v. *Zimmerman*, 200 F. 2d 322

(C.A. 3, 1952), and *United States ex rel. Kaloudis* v. *Shaughnessy*, 180 F. 2d 489 (C.A. 2, 1950) both are cases in which applications for suspension of deportation were denied without a hearing on the issue, although it was conceded that the applicants were eligible for such relief. In the *Kaloudis* case, supra, Judge Learned Hand, for the Court, stated:

> "The interest which an alien has in continued residence in this country is protected only so far as Congress may choose to protect it; Congress may direct that all shall go back, or that some shall go back and some may stay; and it may distinguish between the two by such tests as it thinks appropriate. The relator does not challenge the test here applied, so far as concerns the deportation order itself; he agrees that, so far as his intrest in residing in this country was protected by statute—in so far as it was 'a legally protected interest'—it had been forfeited. *His position is that, being concededly eligible for suspension of deportation, he was entitled to the exercise of the Attorney General's discretion, and that it appears that this has not been in fact exercised in accordance with the limitations, which must be assumed to confine it.* Unless he is to be permitted a hearing to show that it has not been so exercised, he says that he will be denied 'due process of law.' It does not appear from the record that the Attorney General—through the Board, his delegate —has exercised his discretion in disregard of any implied limitations. We will assume *arguendo* that the contrary might appear: *i.e.*, that the reason given might be so clearly irrelevant that a court could say that the Attorney General had transgressed the statute. Suppose, for example, that he denied suspension because the alien had

become too addicted to attending baseball games, or had bad table manners. But membership, even past membership, in an organization which the Attorney General has 'proscribed' may make an alien's continued residence prejudicial to the public weal. True, without an inquiry we cannot know whether membership in the 'Order' is prejudicial; for we cannot tell whether the Attorney General had adequate grounds for 'proscribing' it. On the other hand we cannot say that he did not; and, if the relator has the privilege of inquiring into the grounds, he has been wronged, and the writ should have gone. An alien has no such privilege; unless the ground stated is on its face insufficient, he must accept the decision, for it was made in the 'exercise of discretion,' which we have again and again declared that we will not review." (Emphasis supplied.)

In the subject case, appellant submitted her motion to reopen the deportation proceedings to the Board of Immigration Appeals. Such procedure is provided for in Title 8, Code of Federal Regulations, Part 6.2. Title 8, Code of Federal Regulations, Part 6.1(d) provides as follows:

"*Powers of the Board*—(1) *Generally.* Subject to any specific limitation prescribed by this chapter, *in considering and determining cases before it as provided in this part the Board shall exercise such discretion and authority conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case*, except that the Board shall have no authority to consider or determine the manner, at whose expense, or to which country an alien shall be deported. (Emphasis supplied.)

Under the authority set forth in Part 6.1(d) the Board of Immigration Appeals properly exercised the discretion of the Attorney General in denying the motion to reopen, and likewise determined the issue of suspension of deportation in so acting. A hearing on the issue of suspension of deportation was unnecessary, inasmuch as neither the statute nor the regulations provide for a hearing on such application where the deportation hearing was concluded prior to the enactment of the statute providing the authority for applying for suspension of deportation.

CONCLUSION

Appellant, concededly deportable under a valid order of deportation, has received full consideration upon the issue of suspension of deportation. A decision, adverse to her, was made without a hearing upon the issue, after an overall evaluation of the facts and circumstances revealed by the motion to reopen the deportation hearing as well as the record already before the Board of Immigration Appeals on the earlier proceeding. Such decision constituted an exercise of discretion of the Attorney General or his authorized delegate, the Board of Immigration Appeals, under the provisions of the Immigration and Nationality Act of 1952. A hearing on the issue of suspension of deportation was unnecessary because neither the statute

nor the regulations promulgated thereunder provide for a hearing on that issue in cases where, as here, the deportation hearing was concluded prior to the time when Congress authorized suspension of deportation for persons occupying the status which appellant claims.

For the above reasons, it is respectfully urged that the decision of the court below be affirmed.

Respectfully submitted,

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